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U.S. Citizenship
and Immigration
Services

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[Redacted]

File: WAC 07 264 50288 Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of Washington and allegedly operates a truck stop. The beneficiary was granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the director erred, that the beneficiary's duties are primarily those of a manager, and that the petitioner supervises a subordinate supervisor. Counsel also submitted a description of the beneficiary's proposed duties in the United States, which includes a breakdown of the amount of time he will allegedly devote to each of his ascribed duties.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory

duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, and counsel on appeal appears to restrict the beneficiary to the managerial classification. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is claiming that the beneficiary will be employed as either a manager *or* an executive and will consider both classifications.

The petitioner describes the beneficiary's proposed duties as general manager of the truck stop in a letter dated September 10, 2007 as follows:

As General Manager, [the beneficiary] has established the rules and policies of [the petitioner], is responsible for representing [the petitioner], oversees major negotiations, and determines which products will be sold. Additionally, he directs all marketing activities, executes contracts including for the purchase of large quantities of gasoline, diesel fuel, and grocery products, and oversees quality control. He checks and directs inventories, confirms the schedules for the lower employees, oversees all banking operations, and directs the overall day[-]to[-]day operation of the [truck stop] primarily through the resident Manager. In unusual circumstances, such as an emergency or illness of an employee, [the beneficiary] may also do very limited work activities of a regular worker, such as attend the cash register if necessary.

The petitioner also submitted an organizational chart for the United States operation. The chart shows the beneficiary at the top of the organization directly supervising a "manager" who, in turn, is shown supervising five subordinate truck stop workers.

On September 22, 2007, the director requested additional evidence. The director requested, *inter alia*, a description of the duties of the beneficiary's proposed subordinate employees, copies of the petitioner's quarterly wage reports, and evidence that the beneficiary will supervise and control the work of supervisory,

managerial, or professional employees, or will manage an essential function of the organization.

In response, the petitioner submitted quarterly wage reports which indicate that, in the quarter immediately preceding the filing of the petition, the petitioner employed, at most, five workers. The petitioner also submitted a payroll summary for the third quarter of 2007 which indicates that it regularly employed approximately six workers during this time period, including the purported "manager." Moreover, the petitioner further described the duties and role of the subordinate "Store Manager" as follows:

- Management of the store.
- Supervising lower employees.
- Training new employees.
- Hiring and firing of lower employees.
- Determining and ordering grocery inventory for sale by the truck stop.
- Scheduling and controlling diesel and gasoline supplies.
- Ordering vehicle supplies, oil, etc.
- Creating daily settlements.
- Preparing daily, weekly, and monthly reports.
- Preparing all checks for payment of bills for the truck stop.
- Preparing deposits for the bank for truck stop sale proceeds.
- Filling-in to perform lower employee duties during times when regular employees are not available.

Finally, the petitioner further described the beneficiary's duties as follows:

As General Manager, [the beneficiary has] established the rules and policies of [the petitioner], represent[s] [the petitioner], oversee[s] major negotiations, and determine[s] which products will be sold. Additionally, [the beneficiary] direct[s] all marketing activities, execute[s] contracts including for the purchase of large quantities of gasoline, diesel fuel, and grocery products, and oversee[s] quality control. [The beneficiary] check[s] and direct[s] inventories, confirm[s] the schedules for the lower employees, oversee[s] all banking operations, and direct[s] the overall day[-]to[-]day operation of [the truck stop] primarily through the [store manager]. [The beneficiary] exercise[s] unrestricted discretion in all decision-making, including the hiring and firing of the Store Manager and of other employees and other personnel matters.

In L-1A status, [the beneficiary] normally travel[s] from [his] home in Canada to [the truck stop] approximately three times per week, for part of a work day each time. [The beneficiary] meet[s] with the Store Manager, and review[s] work schedules and the overall operation of the business. As General Manager, [the beneficiary] direct[s] the Store Manager, and operate[s] and conduct[s] [his] management activities primarily through [the Store Manager]. [The beneficiary] oversee[s] financial matters, and sign[s] all checks which have been prepared by the Store Manager for payment of bills. Because [the beneficiary] split[s] [his] management duties between the management of the affiliated business in Canada and the business in the United States, it is essential that the Store Manager have responsibility

on a day-to-day basis to manage the truck stop since [the beneficiary is] working most of the time in Canada.

On October 19, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary's duties are primarily those of a manager. In support, counsel submits a description of the beneficiary's proposed duties in the United States, which includes a breakdown of the amount of time he will allegedly devote to each of his ascribed duties. In the description, the petitioner claims that the beneficiary will devote 60% of his time to "review[ing] the work of the Manager and direct[ing] the Manager." The beneficiary will allegedly devote the rest of his time to performing other tasks such as negotiating, contracting, marketing and advertising, and banking.

Upon review, counsel's assertions are not persuasive.

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Future hiring and business expansion plans may not be considered. A visa petition may not be approved based on speculation of future eligibility. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant matter, it has not been established that the United States operation will employ the beneficiary in a primarily managerial or executive position.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's job description must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. As explained above, a petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will devote most of his time to "review[ing] the work of the Manager and direct[ing] the Manager." The petitioner claims that the beneficiary "checks and directs inventories, confirms the schedules for the lower employees, oversees all banking operations, and directs the overall day[-]to[-]day operation of the [truck stop] primarily through the resident Manager." Finally, the petitioner claims that the beneficiary will "sign all checks which have been prepared by the Store Manager for payment of bills." However, the petitioner does not explain what, exactly, the beneficiary will do on a day-to-day basis to "direct" the manager or to check, confirm, and oversee inventory, scheduling, and banking. The fact that the petitioner has given the beneficiary a managerial or

executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the record is not persuasive in establishing that the beneficiary will primarily perform qualifying duties in his operation of a six-employee, single-location truck stop. As noted above, the petitioner asserts that the beneficiary will "manage" the petitioner's business operations through a subordinate manager. The petitioner also claims that the beneficiary will devote 60% of his time to "review[ing] the work of the Manager and direct[ing] the Manager." However, the petitioner also claims that the beneficiary will perform non-qualifying operational and administrative tasks such as contracting, negotiating, and working with a third party on the operation's advertising and marketing activities. In view of the above, it is not credible that the beneficiary will devote a majority of his time to performing qualifying managerial duties in his purported supervision of a single subordinate supervisor of the truck stop. Not only is the record vague regarding what, exactly, the beneficiary will do in overseeing this "manager," it is not credible that the supervision of a single supervisor in the context of a single-location, six-employee truck stop would consume so much of the beneficiary's time given the many other non-qualifying tasks ascribed to him. Accordingly, it has not been established that the beneficiary will be "primarily" employed as a manager or an executive. To the contrary, it appears more likely than not that the beneficiary will primarily perform non-qualifying first-line supervisory, administrative, or operational tasks in his administration of the truck stop. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the organizational chart, the beneficiary will directly supervise a "manager" who, in turn, will supervise the other truck stop workers. However, the record is not persuasive in establishing that this worker is a bona fide supervisory or managerial employee. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed in a position superior to other employees on an organizational chart, or because he or she supervises daily work activities and assignments. In this matter, the record is not persuasive in establishing that the petitioner has an organizational complexity requiring the employment of an employee who primarily performs "managerial" duties through the supervision of a subordinate tier of managers or supervisors. As noted above, the organization is a single-location, six-employee truck stop. Accordingly, it appears that the "manager" is more likely than not primarily performing non-qualifying administrative or operational tasks along with the other truck stop workers, and the beneficiary is, at most, acting primarily as a first-line supervisor of non-professional

workers. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006). Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.¹

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is too vague such that the AAO cannot deduce with any certainty what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears instead that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations

¹While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record indicates that the beneficiary will primarily be a first-line supervisor of non-professional employees or will perform non-qualifying tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv).

The petitioner described the beneficiary's job duties abroad as an operator of a banquet hall in British Columbia in a letter dated September 10, 2007 as follows:

[The beneficiary] has established the goals and policies of [the foreign employer], has been responsible for representing the company, has overseen all major negotiations, has overseen the design and construction of the facility, has determined which services and products will be offered, and has exercised unrestricted discretion in all decision-making regarding the operation of the company and the Banquet Hall.

[The beneficiary] directs entertainment marketing, enters contracts for shows and artists arranged for the Banquet Hall, manages parties through lower managers, oversees inventories and quality control, directs advanced bookings, controls scheduling of workers, and directs all aspects of the Banquet Hall business. He has the unfettered discretion to direct all personnel matters, including hiring and firing of employees.

The petitioner also submitted a document titled "organizational chart" which indicates that the beneficiary supervised, directly or indirectly, three "managers," one "supervisor," approximately nine "full-time workers," and approximately 30 part-time workers. However, the petitioner did not specifically describe the duties of any of these subordinate managers, supervisors, or workers.

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a primarily managerial or executive capacity. First, the petitioner's vague job description failed to specifically describe what the beneficiary did on a day-to-day basis abroad. Specifics are clearly an important indication of whether a beneficiary's duties were primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in

performing managerial or executive duties abroad. *See* sections 101(a)(44)(A) and (B) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition, and the petition may not be approved for this reason.

The previous approval of an L-1A petition does not preclude CIS from denying an extension based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.